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CHARLES ELMORE CROPLEY

No. 256

In the Supreme Court of the United States

OCTOBER TERM, 1941

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN, AND IRVING ELENTUCH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 19–31) is reported at 120 F. (2d) 485.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 18, 1941 (R. 31). The petition for a writ of certiorari was filed July 11, 1941, and was granted October 13, 1941 (R. 32). The jurisdiction of this Court rests upon Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court found that the Government's use of illegal wire tapping did not substantially contribute to the decision of two of its witnesses who were implicated in the conspiracy to testify in its behalf.

2. Whether the trial court in the preliminary hearing accorded petitioners a fair opportunity to prove that a substantial portion of the Government's evidence derived from illegal wire tapping.

3. Whether, even if the Government's use of illegal wire tapping was a contributing factor in influencing the aforementioned witnesses to testify in its behalf, Section 605 of the Federal Communications Act would render their testimony inadmissible against persons with proper standing to object.

4. Whether, if so, petitioners have such standing to object when they were not parties to the telephone communications which were intercepted and when the communications were not introduced or their contents divulged in evidence.

5. Whether the trial judge in his charge to the jury deprived petitioners of a fair trial by emphasizing the Government's evidence or by intimating his views on questions of fact to be decided by the jury.

If the first question is answered in the affirmative, the Court may also wish to determine the question whether the finding of the trial court, together with its conclusion to the effect that all of the Government's evidence was derived from sources other than illegal wire tapping, are supported by evidence, although such question is not raised by petitioners' assignments of error or statements of questions presented and although the court below stated, in effect, that the evidence was sufficient.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (47 U. S. C., Sec. 605), provides, in part, as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof * * * to any person other than the addressee, his agent, or attorney, * * *; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such infor-

mation was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *.

STATEMENT

On March 22, 1940, a thirty-count indictment was returned in the District Court for the Southern District of New York, charging petitioners and six others in twenty-nine counts with using the United States mails in the execution of a scheme to defraud, in violation of Section 251 of the Criminal Code (18 U. S. C., Sec. 338), and, in the thirtieth count, with conspiracy to commit the substantive offenses, in violation of Section 37 of the Criminal Code (18 U. S. C., Sec. 88) (Tr. 6–75).[1] Six of the defendants were convicted on various counts of the indictment,[2] but only the petitioners appealed to the court below (Tr. 91, 93). Petitioners were sentenced as follows: Goldstein, fifteen months; Schwartz, one

[1] Petitioners were granted leave to proceed herein in *forma pauperis* (R. 31–32). The reference Tr. is used to indicate pages of the typewritten transcript; the letter R. refers to the printed portion of the record.

[2] Defendant Joseph Garrow, charged as a member of the law firm which directed the present conspiracy (Tr. 9–10), pleaded guilty prior to trial (Tr. 85). There was a severance as to two other defendants (Tr. 88) and a fourth defendant pleaded guilty during the trial (*ibid.*).

year and a day; Rubin, six months; and Elentuch, two months (Tr. 92). The court below affirmed the judgments (R. 31).

The scheme alleged in the indictment was, in its essentials, parallel to that which was before this Court in *Weiss* v. *United States*, 308 U. S. 321; that is, an elaborately articulated plot, participated in by lawyers, doctors, "runners," and insurance policyholders, to defraud insurance companies by inducing them, by means of fraudulent representations, to pay false claims for simulated disabilities.

The conspiracy in the *Weiss* case centered about and was directed by the law firm of J. J. and A. L. Weiss. That in the instant case operated under the direction of the law firm of Garrow and Garrow, which employed some of the same doctors and "runners." Petitioner Goldstein and another doctor, Messman, a co-conspirator who confessed and testified in behalf of the Government in the present case, were among the defendants in the *Weiss* case.

The sufficiency of the evidence introduced at the trial is not challenged here. The main issue is as to the admissibility of testimony allegedly obtained through the illegal use of wire tapping. When the *Weiss* case was remanded following the reversal of the convictions by this Court, the trial court, upon motion of the defendants in that case and pursuant to *Nardone* v. *United States*, 308

U. S. 338, conducted a preliminary inquiry into the sources of the Government's evidence. Upon the basis of the evidence adduced at that hearing, including testimony by Messman, the trial court concluded that Messman and other witnesses had not been induced to confess and testify for the Government by being confronted with reproductions of intercepted telephone communications or by learning that the Government had such, and that their memories had not been refreshed by such reproductions. The court accordingly held that the Government could avail itself of their testimony. *United States* v. *Weiss*, 34 F. Supp. 99 (S. D. N. Y.). Thereupon all the defendants in that case except Goldstein pleaded guilty (see Goldstein Br. 6). The Government then abandoned the *Weiss* case and moved the trial of the indictment in the instant case (see *id.*, pp. 6–7).

Prior to the trial in the present case petitioners and the other defendants applied to the district court for an order, *inter alia*, suppressing records and transcripts of intercepted telephone messages, evidence obtained by the use of such messages, and the testimony of all witnesses whose recollections were refreshed or whose testimony was in any wise aided by such messages, or resulted from information derived therefrom (Tr. 103–114). The application also sought to have the indictment dismissed in the event that it should be proved to have been based on evidence illegally

obtained. (Tr. 108). An extended preliminary hearing was held before the same judge who had sat at the similar hearing in the *Weiss* case. The main issue, it developed, concerned the prospective testimony of co-conspirators Messman and Elias Garrow, who, it was contended, had confessed and agreed to testify for the Government as a result of being confronted with records of intercepted messages. Much of the evidence introduced was incorporated by stipulation from the *Weiss* hearing and was reread in open court at the preliminary hearing in this case. (See Tr. 114–115, 117–273, 428–458, 483–593, 616–906.) The pertinent facts revealed by this and the other evidence adduced are set forth in Point I of the Argument (*infra*, pp. 18–31).

At the close of the preliminary hearing the court ordered that all records and transcripts of intercepted messages be suppressed together with "all evidence obtained by the United States as a result of intercepted messages" (Tr. 613–614). However, it refused to dismiss the indictment and denied that part of the motion which requested the suppression of the testimony of witnesses whose recollections had been refreshed or whose testimoney had been in any wise aided by intercepted messages; it reserved for specific rulings at the trial final decision as to that part of the motion which requested the suppression of testimony resulting from information derived from such mes-

sages (Tr. 595, 614–615). It ruled that further objections at the trial based on wire tapping would not be foreclosed (Tr. 478, 593–594, 615).

Thereafter the trial was held before a jury. Over the objections of petitioners, the court permitted the Government to call Messman and Garrow, and they testified (Tr. 962, 2110). Motions subsequently made to strike their testimony were denied (Tr. 5081–5082). None of the records or transcripts obtained by wire tapping was introduced in evidence, nor did Messman or Garrow or any other of the numerous witnesses testify as to the existence or contents of any intercepted communication.

Upon appeal from the convictions the court below found nothing in the record to contradict the testimony of the Government agents who prepared the case that the wire tapping had not furnished clues used in preparing the case (R. 22). The court also concluded that the convictions could not stand if either Messman or Garrow should not have been permitted to testify (R. 22). Upon its own construction, it concluded further that the trial court did not find that the use of wire tapping had not been instrumental in inducing Messman and Garrow to testify for the Government, but meant to find merely that the accused had not proved the contrary (R. 22–24). It held, however, that since petitioners were not parties to any of the intercepted telephone communications, they had no standing under Sec-

tion 605 of the Federal Communications Act to object to their divulgence (R. 24–28). Alternatively, the court held that the convictions should also be sustained because, in any event, Section 605 prohibits only the divulgence of intercepted communications, not the introduction in court against third persons of evidence procured through a past divulgence of them (R. 28). The court held, in addition, that the defendants' right of examination had not been limited unduly at the preliminary hearing (R. 30), and that the judge's charge to the jury at the trial was not improper (R. 29–30).

SUMMARY OF ARGUMENT

I

None of the illegally intercepted communications was introduced in evidence and none led to any clues which the Government used in preparing the case or in establishing its proof. Accordingly, if there was any causal relationship between the Government's evidence and the intercepted communications, it must be found in the testimony of Messman or Garrow. The court below said that it would not have disturbed a finding that there was no such causal connection, if such a finding had been made. It held, however, that the trial court meant to find no more than that the accused had failed to prove the existence of such a connection, whereas the burden was on the Government to establish the absence thereof.

No ruling or remark of the trial judge was or is now cited in support of this interpretation of what he found. His rulings permitting Messman and Garrow to testify notwithstanding that he had granted that portion of petitioners' motion which sought to suppress "all evidence obtained by the United States as a result of the use by it of said intercepted messages" are consistent only with a finding that their knowledge of the wire tapping had not motivated them to turn state's evidence. Moreover, in denying that portion of the motion which sought to suppress the testimony of witnesses whose recollection was refreshed or whose testimony was aided by the intercepted messages, the trial court said that it did so upon the grounds stated in its memorandum opinion in the *Weiss* case, 34 F. Supp. 99, 101. In that opinion the court found, in substance, that Messman and others who turned state's evidence were induced to do so by considerations of self-interest free from any influence of wire tapping.

Since the court below was satisfied that the evidence was sufficient to support a finding that the Government's case, including the testimony of Messman and Garrow, was derived from sources independent of illegal wire tapping, and since the trial court so found, this Court may decline any further review of the evidence. Neither in their assignments of error nor statements of questions presented do petitioners raise any question as to the sufficiency of the evidence. In any event, as we show (*infra*, pp. 17–31), the evidence was ample to

support the conclusions both that the Government's information of the conspiracy and petitioners' involvement therein was obtained from sources other than wire tapping, and that the use of wire tapping did not induce Messman or Garrow to testify for the Government and did not refresh their recollections or otherwise aid their testimony.

If the foregoing contentions and the fairness of the preliminary hearing are upheld, no disputed question as to the applicability of Section 605 of the Federal Communications Act is involved or need be determined.

II

Petitioners contend that at the preliminary hearing the trial court denied them a fair opportunity to prove that a substantial portion of the Government's case was derived from wire tapping, in that they were denied opportunity to examine certain documents and were restricted in their right to cross-examine. They complain also that witnesses were permitted to state opinions favorable to the Government. These contentions are without merit.

The documents sought to be examined were investigative reports the disclosure of which would have revealed in advance of trial virtually all the evidence in the Government's possession and perhaps have implicated with criminals persons whom further investigation would show to be innocent. Moreover, the court itself examined the documents

and made available to the defendants those parts having to do with wire tapping. This was a fair and practicable procedure. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234. The records and transcriptions of the intercepted messages also were available to the defendants and at the trial they had opportunity not availed of to object to any evidence they considered to be tainted.

III

Section 605 of the Federal Communications Act would not render the testimony of Messman and Garrow inadmissible even if information of the fact that the Government had obtained evidence against them by means of wiretapping was a contributing factor in motivating them to turn state's evidence.

If the evidence warrants any inference of a causal relationship between the illegal wire tapping and the testimony of Messman and Garrow, the connection is "so attenuated as to dissipate the taint" and Section 605 is not applicable. *Nardone* v. *United States*, 308 U. S. 338, 341.

Section 605 prohibits the divulgence of the existence, contents, purport, or effect of an illegally intercepted communication, and it prohibits any person knowing of the illegal obtention from using the communication or any information contained in it "for his own benefit or for the benefit of another not entitled thereto." In the present case, there was no divulgence in evidence of the

existence, contents, purport, or effect of any of the illegally intercepted communications or of any facts derived therefrom. And the divulgence to Messman and Garrow of the fact that the Government had wire tapping evidence against them was not a "use" for the "benefit" of anyone within the meaning intended by Congress. This contention is not contrary to any policy shown by the legislative history, and it is not foreclosed by this Court's decisions in the *Weiss* or second *Nardone* case.

IV

As was held by the court below, petitioners, not having been parties to the illegally intercepted communications, are without standing to object to the evidence introduced against them, assuming it to have been contaminated. This constitutes an additional alternative ground for affirmance. Section 605 was designed to protect the sender alone; by its express provisions it is not violated if the sender authorizes the interception. It has long been held that a third party may not object to the introduction against him of evidence obtained in contravention of the Fourth or Fifth Amendments and there are no considerations of policy which would dictate a different result and the imposition of stronger sanctions for violations of Section 605.

V

The court's charge when read as a whole was fair. It left the jury free to form its own con-

clusions and it did not unduly stress the evidence introduced by the Government.

ARGUMENT

I

THE TRIAL COURT CORRECTLY FOUND, UPON SUBSTANTIAL EVIDENCE, THAT THE GOVERNMENT'S PROOF, INCLUDING THE TESTIMONY OF MESSMAN AND GARROW, WAS NOT OBTAINED THROUGH THE USE OF WIRE TAPPING

Throughout the proceedings the Government's position has been that its proof in this case derived from sources independent of wire tapping and hence, apart from other reasons, was not within the prohibition of Section 605 of the Federal Communications Act. See *Nardone* v. *United States*, 308 U. S. 338, 341. Since none of the intercepted messages was put in evidence, they could, in any event, have contributed to the convictions only if they had furnished clues used in the preparation of the case, or if they had served to induce Messman and Elias Garrow to testify, or had had some other derivative relation to the evidence which the Government introduced. The trial court decided that the Government's evidence was not tainted or inadmissible under Section 605 as construed in the second *Nardone* case, and its decision, we submit, was correct. If this be so, no disputed question as to the proper interpretation of Section 605, which we discuss under Points III and IV, *infra*, pp. 38–50, is involved or need be determined.

The court below was satisfied that the illegally intercepted messages had not been used as clues (R. 22), and it said that if the trial judge had affirmatively found that the wire tapping had contributed nothing to the decisions of Messman and Garrow to turn state's evidence, it would not have disturbed the finding (R. 23). It concluded, however, "that it does not appear that the judge meant to find more than that the accused failed to prove that the 'taps' had contributed to the breakdown" (R. 23), whereas in view of the initial showing which, it said, was made by petitioners that taps had been made "and had to some extent been used to break down Messman and to a less degree Garrow," the burden shifted to the Government to prove that the taps had no part, or no substantial part, in achieving that result (R. 23–24). For these reasons it held that if petitioners were entitled to invoke the protection of Section 605, Messman and "probably" Garrow should not have been permitted to testify (R. 24). It further held, however, that petitioners were not so entitled.

The trial court did not find in so many words that wire tapping had played no part in inducing Messman and Garrow to testify. However, the court's rulings and statements are consistent with no other finding. Thus, although the court granted that portion of petitioners' motion which sought to suppress "all evidence obtained by the United States as the result of the use by it of

said intercepted messages" (Tr. 613–614), it permitted Messman and Garrow to testify and it later refused to strike their testimony (Tr. 962, 2110, 5081–5082). Moreover, in denying the immediately following portion of the motion which asked the suppression of the testimony of all witnesses whose recollection was refreshed or whose testimony was in any manner aided by such messages, the court said that it did so "for the reasons stated" in its memorandum opinion in the *Weiss* case (Tr. 614).

As we read that memorandum opinion, the court found, in substance, that Messman and the other witnesses whose decisions to turn state's evidence were there under examination were motivated by considerations of self-interest free from any contaminating influence of wire tapping. 34 F. Supp. 99, 101. Such, too, is the construction placed upon the opinion in the brief (p. 4) for petitioner Schwartz. Accordingly, as is also recognized in that brief (pp. 3–4) and as is not disputed in the briefs for the other petitioners, it is evident that in this case too the trial court was satisfied and in fact found that there was no relation, or at least no substantial relation, between the illicit wire tapping and the testimony of either Messman or Garrow.

The view of the court below that the trial court meant to find no more than that petitioners had failed to prove a causal connection between the

wire tapping and the decisions of Messman and Garrow to testify finds no support in any of the judge's rulings or remarks. None was cited by the court below and none was or is now invoked by petitioners. The error of the view taken by the court below is indicated further by the fact that the petitioners did not urge it. At the hearing there was no disagreement or misunderstanding between the parties or between any of them and the judge as regards the burden of proof at any stage under the procedure outlined by this Court (308 U. S. at 341) in the second *Nardone* case, and it cannot be said that any undue burden was imposed upon the petitioners or that the judge's findings reflect an erroneous notion as to who had the burden. (See Tr. 324–326, 348–349, 624–625, 819–820, 822.)

It seems clear, therefore, that the court below was wrong in concluding that the trial court did not find that the use of wire tapping was not a cause that motivated Messman or Garrow to testify for the Government.

Assuming that the trial court's rulings and statements are to be construed as a finding of no such causal connection, the question arises whether the evidence was sufficient to support it, as well as to support the conclusion of both lower courts that the Government's case was not otherwise tainted. As already noted, the court below agreed that the evidence was sufficient (R. 22, 23). In view of

this fact and of the circumstance that the issue of the sufficiency of the evidence is not raised in petitioners' assignments of error or statements of questions presented, the Court may decline a further review of the evidence. However, in the event that the Court may wish to undertake such a review, we now summarize the facts as shown by the evidence introduced at the preliminary hearing which support the action of the trial court in permitting Messman and Garrow to testify.

A. THE GOVERNMENT PROVED THAT ITS INFORMATION AS TO THE CONSPIRACY AND PETITIONERS' INVOLVEMENT THEREIN WAS OBTAINED FROM SOURCES OTHER THAN WIRE TAPPING.

Early in the summer of 1936 a number of insurance companies retained two New York law firms to investigate fraudulent disability claims (Tr. 167, 187–188). Shortly thereafter one Harry Kipnis confessed to Bernstein, a member of one of these firms, that he had been both a fraudulent claimant and a solicitor of fraudulent claims for the Weiss and Garrow law firms (Tr. 230, 234, 638, 654). He implicated petitioner Goldstein, Dr. Messman, defendant Joseph Garrow, and others (Tr. 288, 623–634, 649–652). Kipnis was then employed to aid in the investigation and was instructed to maintain his contacts with the conspirators (Tr. 234). Thereafter he supplied case histories of frauds in which he had participated (Tr. 634; Ex. 6)[3] and daily written reports con-

[3] The exhibits referred to in this brief are in the series introduced or identified at the preliminary hearing.

cerning the activities of the conspirators (Tr. 657–658). During this same period Bernstein conducted an independent investigation of the insurance companies' files and of their hospital records (Tr. 305, 727–729). In October, Kipnis' oral confession was reduced to writing; as written it covered 52 pages and set forth details as to the fraudulent activities of Messman, Goldstein, J. J. Weiss, and others (Ex. 5; Tr. 280, 623–634, 727).[4]

In order to corroborate details already revealed by Kipnis, the lawyers for the insurance companies had recording machines installed in the offices of Kipnis and Friedman, another informer (Tr. 181–187, 218, 234, 461, 466–467, 617–618). These machines were used to record room conversations and, with the consent of Kipnis and Friedman, were attached to extension receivers and recorded telephone conversations (Tr. 182–187). Cf. *United States* v. *Polakoff*, 112 F. (2d) 888 (C. C. A. 2), certiorari denied, 311 U. S. 653. Any clues or leads which may have been discovered through these recordings were not, however, investigated (Tr. 314, 338, 463). And before either type of recording was made Bernstein had independent evidence as to the entire gamut of the conspiracy and was aware that all four of the petitioners were involved (Tr. 218, 467).

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[4] At the preliminary hearing Dailey, the Government attorney in immediate charge of the case, read into the record significant proof contained in Kipnis' confession and case histories (Tr. 623–683).

In November 1936 the insurance companies made available to the United States attorney all the evidence that had been gathered, including Kipnis' confession and case histories, Kipnis' and Friedman's daily reports, the information gleaned from insurance companies' files and hospital records, and the records of room and telephone conversations. On November 28, 1936, post-office inspector Shea was assigned to examine this material (Tr. 153, 156, 616–619). On December 6 he rendered a report, based solely upon his inspection of the results of the insurance companies' investigation, in which he stated that, in his opinion, a complete mail fraud case existed, and, further, that the evidence on hand warranted the indictment of seventy-five persons "without any further investigation" (Tr. 153, 158, 287, 306). Shea's report contained only one reference to a recorded telephone conversation (Tr. 292–294). This was a conversation between Kipnis and J. J. Weiss, which did not relate to the scheme charged in the present indictment or to any of the petitioners and which in any event merely corroborated facts which had been previously revealed to the Government in one of Kipnis' daily reports (Tr. 253–254, 294–295).

Although Shea and some of the lawyers for the insurance companies believed that no further proof was necessary and that prosecution of the case should not be postponed, and although the

Government attorneys also believed that they had sufficient proof to prosecute the defendants, it was decided to defer action until after the United States Attorney had had an opportunity to confer with the Attorney General concerning the case. It was also decided to secure further corroboration of the proof on hand. (Tr. 258, 303–304, 311–312, 619–620, 626, 688, 809. Cf. Tr. 758–760.)

Pursuant to the United States Attorney's instructions, Shea, assisted by the New York City Police, installed taps on the telephone wires serving Messman's office, the Weiss and Garrow law offices, and J. J. Weiss' home (Tr. 118–119, 159, 688). Telephone conversations thus intercepted during various periods between January 29, 1937, and May 20, 1937, which was two days after the first arrests (see Tr. 101–102), were recorded mechanically or transcribed by stenographers supplied by Bernstein's firm (Tr. 119, 264–270).

The recordings and transcriptions were not given to the insurance companies' attorneys (Tr. 121, 174, 271–272), but were delivered instead to Shea (Tr. 120, 270–271) and he, in turn, delivered them to the United States Attorney's office, where they were filed away (Tr. 121, 160, 313, 387, 689). Shea never heard the recordings (Tr. 125, 160). His investigation was concluded with the submission of his report; he never traced any clues that may have resulted from the wire

taps (Tr. 160). In fact, immediately after he submitted his report, he entered upon other work, returning only to arrange for the interceptions and to collect the recordings (Tr. 289, 159–160). And neither the United States Attorney nor his assistants made any use of the intercepted communications until nearly four months after the arrests when the *Weiss* case was being prepared for trial (Tr. 314, 688–689). At no time did the prosecutors investigate any leads derived from the communications (Tr. 338, 688, 874). The telephone wires were tapped solely for corroborative purposes (Tr. 218–219, 234, 258, 303, 440, 626), and any clues revealed by the taps were regarded as trivial compared with those obtained from other sources (Tr. 339). Moreover, although some of the recordings and transcripts were used in preparing and trying the *Weiss* case, no such use was made of them in the instant case (Tr. 380–381, 366, 368, 472–474).

During the period of the wire tapping, the Government also investigated the insurance companies' files on cases in which the Garrows or Weisses represented the claimants and in which Messman or Goldstein appeared as doctor (Tr. 620–621).

Thus, prior to the time when petitioners or any of the other conspirators were arrested the Government had as sources of evidence the information supplied by the informers, the recordings of

room conversations in their offices, the insurance companies' files, and hospital records (R. 621–622, 727–729). The Government attorney in immediate charge of the case testified that the proof derived from these sources, which had no connection whatever with illicit wire tapping, was alone sufficient to have warranted a prosecution (Tr. 626, 753, 802, 809), and the record contains nothing to contradict his word (see R. 22).

In view of the foregoing facts and of the limited character of petitioners' specific claims, the only remaining question with respect to the sufficiency of the evidence to support the trial court's determination concerns the admissibility of testimony given by Messman and Garrow.

B. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDINGS THAT THE USE OF WIRE TAPPING DID NOT INDUCE MESSMAN OR GARROW TO TESTIFY FOR THE GOVERNMENT AND DID NOT AID THEIR TESTIMONY

Petitioners assert that Messman and Elias Garrow were induced to confess and testify for the Government as a result of being confronted with the fact that the Government had intercepted their telephone communications by means of wire tapping. They assert also that the records of these intercepted communications were used to refresh Messman's recollection (Goldstein Br. 9–13; Schwartz Br. 4). The evidence, however, was ample to support the contrary conclusions of the trial court.

Messman

Messman and Garrow, with many others, were arrested on May 18, 1937 (Tr. 428, 403). Messman, by coincidence so far as the record shows (Tr. 329–330), was lodged in a cell with Nelson, a co-conspirator, who had heard a record of a telephone conversation which he had with J. J. Weiss from Messman's office (Tr. 330, 431, 515). Without describing any particular evidence implicating Messman, Nelson told him that the Government "had all kinds of evidence against us," including wire taps (Tr. 431, 514–519, 540). Later the same day Messman was questioned by assistants of the United States Attorney and, although none of the recorded messages was played or described to him (Tr. 315, 328–329, 374, 402, 433, 552), he was apprised of the fact that his and other telephone wires had been tapped (Tr. 319, 432–433, 519, 538).[*] An admitted purpose of the prosecution

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[*] The pertinent portion of the Government attorney's statement to Messman is, in full, as follows (Tr. 319, 537–539):

"That is exactly what we want. I am telling you before we go any further that there is no use of us kidding each other. We have watched your telephone; we have watched all these lawyers' telephones; we have had rooms tapped. We know what is going on. We are not stabbing in the dark. If you want to hear your voice on a record we will be glad to play it. In your instance, Doctor, there is so much to cover. You have been in this for so many years that we feel that in order for you to help yourself, since you are con-

was to induce Messman to plead guilty and testify as a Government witness (Tr. 375, 833, 859–860). Messman offered to "break the entire racket wide open" if the Government attorneys would promise leniency (Tr. 434, 522, 690, 857). He was told that the prosecutors would do their best to recommend as much leniency as would be compatible with the situation, but that they could make no promises and that he should go back to his cell and think it over (Tr. 434, 550, 690). The following morning, after he was advised again that the prosecutors could make no promises, but that "we will do what we can to help you out," he made a full confession (Tr. 483–484, 521, 691). Thereafter, he devoted a considerable amount of time assisting in the preparation of the case and he received a salary from the Government (Tr. 231, 485, 509–510).[6]

Messman testified that the references to wire tapping by Nelson and the assistant United States attorney in no way influenced his determination to confess and testify for the Government (Tr. 520, 540, 542, 552). He had realized the inevitability of detection as far back as September 1936 (Tr.

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sidered one of the principals here, it would be wise for you to indicate to us whether you intend to tell us everything and come clean, or whether you intend to play ball with the Garrows and the rest of the crowd. We feel that you can be of great value and you want to help yourself. That is straight talk."

[6] At the time Messman confessed nothing was said to him with regard to receiving a salary (Tr. 483).

519–520) when Weiss began to suspect that Kipnis was acting as an informer (Tr. 896–898), and he had thought of confessing two weeks prior to his arrest (Tr. 519). He had seen Kipnis at police headquarters when he was arrested and associated Kipnis' presence there with the incidents of September 1936 (Tr. 549). Messman testified further that when he was first taken to the federal building he was "ready to do the right thing." (Tr. 552). Messman assigned as his reasons for resolving to confess his belief that an investigation in which the Government had amassed a great deal of evidence had been going on for a long time, that many of his co-conspirators were undependable and would certainly confess, that Kipnis' office at 280 Broadway had been wired or watched, and that the Government probably knew "about our phony papers, phony hospitalization, and all that" (Tr. 574–576). Because of these factors he felt he must take the course that afforded him the best chance of retaining his license to practice medicine (Tr. 434, 690).

Although Messman stated he had decided to confess before learning of the wire tapping, he said he delayed doing so in order to size up his prosecutors and assure himself of favorable treatment (Tr. 540–545, 550). His controlling consideration was what terms he could make, not whether he could be proved guilty (*ibid.*). Consequently, what Nelson and the Government attor-

neys told him about wire tapping had nothing to do with his confession and willingness to testify (Tr. 520, 542, 552). The assistant United States Attorney's statement that Messman's telephone had been watched did not affect his intentions "because I came into that room with an idea of sizing up the various people who were going to question me and try to better my position if those people seemed to be decent people" (Tr. 540). "I was engaged in sizing up the people, not in listening to their arguments. I knew I was guilty" (Tr. 541). The interview affected his course of conduct only to the extent that it made him believe that he would receive some advantage by confessing (Tr. 544–545).

This explanation is supported by the testimony of the Government attorney that within a few minutes after he began questioning Messman, the latter said: "If you will guarantee me that I will come off scot free why I will give you, I will blow this racket into the open" (Tr. 690), and that on the next day when Messman was told that the prosecution would do what it could to help him out he immediately agreed to confess (Tr. 691). Moreover, unless Messman had already decided to confess, it is probable that he would not have done so before confirming the statements that the Government had proof against him; it is reasonable to suppose that he would have accepted the attorney's offer to play a record of his conver-

sations or would have asked to see some of the other evidence incriminating him (see Tr. 319, 539, 519, 552). In addition, at the time of the trial of the instant case, Messman must have known that the Government's wire tapping evidence could not be used against him under this Court's decisions in the *Nardone* and *Weiss* cases (see Tr. 502), yet such knowledge did not alter his desire to testify.

There is no evidence contradicting Messman's testimony as to his own mental processes, and his explanation is clearly plausible. His credibility was a matter for the trial court and its finding (*supra*, p. 16) to the effect that he was motivated by considerations of self-interest independent of knowledge as to wire tapping should not be overturned. The finding certainly cannot be characterized as clearly erroneous.

Refreshment of recollection: The evidence also was sufficient to show that the testimony of Messman should not be barred on the ground that the records of the intercepted communications were used to refresh his recollection. In September 1937, four months after he confessed, and when the Government was preparing for the trial of the *Weiss* case, a number of the recordings of intercepted telephone conversations were played to him for the first time. He identified them and initialed corrected transcripts. (Tr. 351–352, 356–357, 485–486, 523.) References to some of the transcriptions were made in the trial brief of

Messman's testimony prepared for the *Weiss* case (Tr. 509–510). Messman testified at the preliminary hearing in that case, however, that what he heard did not refresh his recollection, except as to dates and the explicit language of particular conversations, and merely served to assist him in organizing the narrative (Tr. 511–513, 488). He recalled independently all the significant conversations (Tr. 488). Weight is lent to Messman's testimony by the fact that from the date of his arrest in May 1937 to September 1937 he was questioned frequently by members of the United States Attorney's staff and supplied them with detailed evidence, yet had no access to the recordings and transcripts (Tr. 351). In the summer of 1937 he testified before the grand jury which returned the *Weiss* indictment for a longer period than he did at the trial of that case without ever having heard or seen any of the recordings or transcripts (Tr. 523–524, 730–731).

Upon the basis of the evidence presented at the preliminary hearing in the *Weiss* case, the trial court found as to Messman (34 F. Supp., at 102):

> He revealed at this hearing a complete mental picture of the entire series of events involved. The only incident as to which his memory was refreshed by the prohibited means was as to the exact time and duration of a given telephone conversation. They were indeed trivial incidents, although

perhaps convincing as to details. Without recourse to them his testimony otherwise should be available to the government in this case.

The trial court adopted and applied these findings in the instant case (Tr. 614) and the court below saw no reason to disturb them. Their validity in the instant case is particularly clear in view of the lapse of time prior to the present trial. The latter did not commence until June 1940, whereas Messman's last access to the records and transcriptions appears to have been nearly two years earlier (Tr. 366, 381). He testified, moreover, that he had never seen the transcript of his testimony in the *Weiss* case (Tr. 1288).

Garrow

Petitioners' contention that the testimony of Garrow was inadmissible is conceded to be weaker than is their similar contention as to Messman (Goldstein Br., 12). Following Garrow's arrest on May 18, 1937, the Government attorneys attempted to question him, but he claimed his privilege against self-incrimination, and they made no further efforts to obtain information from him. Wiretapping was not mentioned to him. (Tr. 341, 403; Def. Ex. CC[7]) In fact Gar-

[7] No question can be raised as to use of records of intercepted communications to refresh Garrow's recollection. He never saw any of the transcripts or heard any recordings (Tr. 413–415).

row had no suspicion that the Government had tapped his telephone wires until about a week after his arrest when he learned from Weiss and the newspapers that wire tapping, without reference to any particular conversation, had occurred (Tr. 415–418). Two years later, in April 1939, Garrow pleaded guilty to one of the insurance fraud indictments and was sentenced to imprisonment for twenty months (Tr. 342, 3013). After he had served six months of his sentence he applied for parole; thereafter he was visited at the penitentiary by the assistant United States attorneys. He was paroled in February 1940 and thereafter testified for the Government (Tr. 3015).

At no time was Garrow confronted with any evidence against him procured by wire tapping (Tr. 408, 419). Garrow testified that he knew that the Government had records of his telephone conversations, but that he had never heard them and did not believe they incriminated him (Tr. 415–417). The existence of these records, he said, had nothing to do with his decision to plead guilty (Tr. 412, 418).

In the light of this evidence it may not be said that the trial court was unwarranted in concluding that there was no relation between Garrow's knowledge that his telephone wires had been tapped and his action in turning state's evidence.*

* It is suggested (see Goldstein Br. 12) that the circumstance that Garrow pleaded guilty shortly after the Second

II

THE TRIAL COURT PLACED NO UNFAIR RESTRICTIONS UPON PETITIONERS AT THE PRELIMINARY HEARING

If the Court sustains our position under Point I, the only further questions which need be decided concern the fairness of the preliminary hearing and the fairness of the judge's charge to the jury at the trial. Since the first of these questions is related to Point I, we treat it at this place. The second question is discussed under Point V, *infra*, pp. 50–56.

The purpose of the preliminary hearing was to ascertain whether the proof against petitioners, or a substantial portion of it, derived from wire tapping. Petitioners contend that the trial judge

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Circuit approved the use of intercepted intrastate telephone communications in the *Weiss* case (103 F. (2d) 348) indicates that he was motivated by a belief that the recordings in the possession of the Government incriminated him. The court below rejected this contention (R. 23). It seems clear that the Second Circuit's decision in the *Weiss* case could have had no bearing upon Garrow's decision to testify in behalf of the Government in the case at bar, for when he made that decision, he had already been convicted and had served part of his sentence.

It is also suggested (Goldstein Br. 12) that the fact that Garrow sat through the *Weiss* trial when "wire taps" were introduced (Tr. 3032) in some way influenced his determination to testify. That trial, however, was held from January 6 to March 4, 1938, and Garrow did not plead guilty or decide to testify for the Government until more than a year later. Moreover, it does not appear that the "taps" introduced at the *Weiss* trial incriminated Garrow.

deprived them of a fair and adequate opportunity to inquire into that question in that he (1) refused to permit them to examine certain documents, (2) improperly limited cross-examination, and (3) permitted witnesses to state opinions and conclusions (Goldstein Br. 31–35; Schwartz Br. 20–22). This contention was overruled in the court below on the ground that petitioners had not been held on "too tight a rein" (R. 30–31).

1. The resolution of the problem raised by the first objection involves a determination of the extent to which the right of the accused to inquire into the sources of the prosecution's evidence is limited by the policy forbidding disclosure of the Government's case before its submission to the jury. This belongs with the "concrete complexities" foreseen in the second *Nardone* case which moved this Court to entrust a large measure of discretion to the trial judge (308 U. S. at 341, 342).

We have already demonstrated that the Government established that its evidence derived from sources independent of wire tapping. In the development of the proof of these independent sources, witnesses connected with the prosecution testified as to the contents of portions of inspector Shea's report (Tr. 284–293), the transcript of Messman's first interview with members of the United States Attorney's staff (Tr. 316–321, 326–327, Ex. BB), and the daily reports, confession, and case histories of Kipnis (Tr. 623–678, Exs. 1, 5

and 6). Petitioners contend that they should have been permitted to inspect these documents, as well as the trial brief of Messman's testimony prepared for this case (Tr. 364–371, Ex. DD) and the statements made by Messman to the assistant United States attorneys subsequent to his agreement to testify for the Government (Tr. 351–354, 371–373 Exs. BB, EE).

These documents and statements showed what information the Government had. Shea's report digested all the facts uncovered in the private investigation carried on by the insurance companies over a period of months (see Tr. 156–158, 287–288, 619). The statements of Messman and Kipnis' confession and reports were accounts of everything revealed by these two key figures who for years had been in the center of the conspiracies (see Tr. 351–353, 355, 372–373, 638–640). And the trial brief of Messman's testimony was described as containing "the Government's whole case without wire-tapping" (Tr. 370). These documents would have disclosed to the defendants the bulk of the evidence in the Government's possession. It is just such disclosures that this Court sought to guard against by its caveat in the second *Nardone* case (308 U. S. at 342) that "claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to

the jury." This is, of course, but an aspect of the policy of federal courts to refuse a discovery of the Government's case in advance of trial. Cf. *Wong Tai* v. *United States*, 273 U. S. 77, 82; *United States* v. *Molasky*, 118 F. (2d) 128, 132 (C. C. A. 7); *United States* v. *Garsson*, 291 Fed. 646, 649 (S. D. N. Y.).

It is to be noted further not only that the documents in question were products of, and embodied the result of, the investigative phase of criminal law administration, but that they indicated widespread crimes involving numerous possible defendants; Shea's report recommended the indictment of seventy-five persons and named some of the suspects (Tr. 287). To have made the documents public by spreading them on the record would have warned those not yet prosecuted of evidence in the Government's possession implicating them, and persons perhaps to be cleared through further investigation might have been linked with criminals. Principles of sound policy and fairness, therefore, weighed heavily in favor of keeping the documents confidential. *Arnstein* v. *United States*, 296 Fed. 946, 950 (App. D. C.), certiorari denied, 264 U. S. 595. Cf. *Vogel* v. *Gruaz*, 110 U. S. 311; *In re Quarles and Butler*, 158 U. S. 532. See also Department of Justice Circular No. 3229, issued pursuant to R. S. 161 (5 U. S. C., Sec. 22), set forth in the Brief (p. 52) for the United States in *Goldman et al.* v. *United States*, Nos. 962, 963, 980, October Term, 1940.

Faced with the task of balancing the foregoing considerations against the speculative handicap non-disclosure would impose upon the accused, the trial judge adopted the course of reading the documents himself and then making available to the defense those portions which he considered to be related to wire tapping. Thus, he read into the record the portion of the transcript of the interview with Messman which contained mention of wire tapping (Tr. 318–320, 334). Likewise he called attention to the one extension telephone recording referred to in Shea's report (Tr. 294–295). Counsel also was permitted to read the portions of the trial brief of Messman's testimony in the *Weiss* case which contained marginal notations referring to wire taps (Tr. 520, 524–534; Ex. X).

As noted by the court below (R. 30), the nature of the hearing was such that the judge necessarily had to "feel his way," and we believe that the practice he followed, at several points suggested by the defense itself (see Tr. 132, 276, 320), was a practicable and fair way of solving the delicate problem presented. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234. In addition to his personal examination of the documents, his ruling that additional objections based upon wire tapping would not be foreclosed by the preliminary hearing, but could be taken during the course of the trial, served to safeguard petitioners' rights (Tr. 478, 615). This ruling, together with

the fact that the records and transcriptions of the intercepted communications had been made available for inspection and were available at the trial (See Tr. 134–137, 145–150, 205, 602–605), gave petitioners ample opportunity to pursue the investigation further if the testimony at any time indicated a need for it.

The procedure adopted by the trial court can be condemned only under a view that once wire tapping has been utilized every document and detail of evidence in the possession of the Government must be subjected to the unrestricted scrutiny of the defense. Such a doctrine would frustrate the Government's right under the second *Nardone* decision to use uncontaminated evidence, for a requirement that it expose its case in advance would make successful prosecution highly unlikely.

Petitioners' remaining objections to the conduct of the hearing require little comment.

2. Petitioner Goldstein lists (Br. 32) five instances in which alleged restrictions were placed upon cross-examination (Tr. 126, 153, 175, 180, 348). It cannot be said that these instances handicapped the development or presentation of petitioners' case. In each instance the witness had been called by the defense. In none did petitioners except to the ruling of the court. In three of the instances counsel expressly withdrew the question objected to (Tr. 126, 175, 180). The record shows

that the court permitted petitioners wide latitude in the examination of witnesses. At no time were they denied an opportunity to re-examine witnesses after they and the Government had examined and cross-examined (see Tr. 160–166, 192, 259–263, 576–593).

3. Nor can the expressions of conclusions or opinions of which petitioners complain be regarded as prejudicial. The preliminary hearing was, of course, held without a jury, and it may be presumed that the court was able to evaluate the opinions for what they were worth. The nature of the hearing was such that it was inevitable that such questions would be asked and that opinions would be volunteered.

III

THE TESTIMONY OF MESSMAN AND GARROW WAS NOT INADMISSIBLE UNDER SECTION 605 OF THE FEDERAL COMMUNICATIONS ACT EVEN IF INFORMATION OF THE FACT THAT THE GOVERNMENT HAD EVIDENCE AGAINST THEM OBTAINED BY ILLEGAL WIRE TAPPING ENTERED INTO THEIR DECISION TO CONFESS AND TESTIFY

We have shown thus far that the trial court found that there was no causal relationship between the illegal wire tapping and the action of Messman and Garrow in testifying as they did, and that such finding is not invalid for lack of sufficient evidence or a fair hearing. However, even if it were assumed that the trial court was required

by the evidence to find, or did find, that such a relationship existed, Section 605 of the Federal Communications Act would not render their testimony inadmissible. This contention is not foreclosed by the decisions in the *Weiss* and second *Nardone* cases.*

In the first place, in view of the evidence summarized under Point I (*supra*, pp. 18–31), the causal connection, if any, was "so attenuated as to dissipate the taint." *Nardone* v. *United States*, 308 U. S. 338, at 341. The strongest inference which might be made from the evidence is that their knowledge that the Government had records of interceptions was a contributing, not the sole or primary, factor which initially decided Messman

* The second *Nardone* case is discussed *infra*, pp 42–43. In the *Weiss* case the Court held that Section 605 prohibits the disclosure in evidence of an illegally intercepted intrastate communication, and that such a disclosure is not permissible as "authorized by the sender" where one of the defendant parties to the communication, which was intercepted without his consent, after being informed of the Government's knowledge of the contents thereof and being subjected to inducements recited by the Court, decided to turn state's evidence and testified to the contents of the communication. The Court held that this was not the authorization by the sender contemplated by the statute 308 U. S. 321, 329–330. That decision, however, did not establish that Section 605 is to be construed to prohibit the testimony of persons who were induced to turn state's evidence by being apprized that the Government had wiretapping evidence against them, where, as here, their testimony did not divulge the contents of any intercepted communication or include any fact discovered from clues contained in such a communication.

and Garrow that it would be to their interest to confess and testify. Moreover, they did not later take the stand until long after this Court had determined in the *Nardone* and *Weiss* cases that the Government could not introduce evidence obtained by wire tapping. Hence in testifying they could hardly have been motivated by their knowledge that the Government had such evidence.

Their testimony, moreover, was testimony from their own lips as to facts known by them out of their own experience in the conspiracy; it was not testimony as to the contents of any intercepted communication or as to facts discovered from clues contained in any such communication. They were examined and cross-examined. The truth or falsity of their testimony, and the weight to be given it, were subjected to the tests usual in trials; indeed, the judge used strong language in cautioning the jury to scrutinize their testimony with "the utmost care" and in the light of the fact that they were of "a very low moral character" and were "crooks" (R. 7–8). In these circumstances, to exclude their testimony as a matter of policy in aid of enforcing the prohibitions of Section 605 would seem to go very far in the realm of judicial sanctions designed to promote compliance with the statute. The instant case may not be invoked as an example of an alleged need for such sanctions. The interceptions occurred prior to this Court's decisions in the *Nardone* and *Weiss* cases, when the Government deemed Section 605 to be inapplicable (see Tr. 848), as did the court below.

Upon examination of the terms of Section 605, in the light of the legislative history,[10] it indeed seems that the testimony of Messman and Garrow would have been admissible even assuming that they testified solely as a result of their knowledge of the existence of the wire taps and would not have done so in the absence of such knowledge. The pertinent provisions of the section read as follows:

> * * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *.

In the instant case neither the intercepted communications nor their existence, contents, sub-

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[10] The legislative history, which shows that Congress had no deliberate intention of prohibiting wire tapping by Government enforcement officers or the introduction of evidence so obtained, is set forth in the Government's brief in the first *Nardone* case (No. 190, October Term, 1937).

stance, purport, effect, or meaning were divulged by being put in evidence either directly or through the testimony of Messman or Garrow. On the contrary, Messman and Garrow testified only to facts which they knew out of their own experience in the conspiracy and which they would have known in the absence of any wire tapping. Thus, unlike the situation in the first *Nardone* and *Weiss* cases, no violation of the disclosure provisions of the statute occurred at the trial in this case. Any such violation was in the past, when the Government attorneys may be said to have disclosed to Messman, but not to Garrow, the "existence" and "purport" of intercepted communications, although not of any particular communication within the possible meaning of the statute.

Nor at the trial was there any violation of the provision that no person shall beneficially "use the same (i. e., illegally intercepted communication) or any information therein contained * * *." Even if it were to be assumed that the Government attorneys engaged in a "use" of the communications in calling Messman and Garrow to the stand after, by hypothesis, the latter had been induced to testify as a result of being told of the interceptions, ~~to testify,~~ it would not follow that their testimony was inadmissible. For a "use" must be "for his own benefit or for the benefit of another not entitled thereto * * *." The language of this requirement scarcely comports with an inten-

tion on the part of Congress to bar testimony such as is here involved. On the contrary, it indicates that Congress had in mind only such uses as were designed to result in some monetary or other similar benefit of a private nature.

In the second *Nardone* case, it is true, the Court ruled that the prohibition of Section 605 is not limited to the disclosure at the trial of the contents of an intercepted communication, but extends to the divulgence of evidence obtained through derivative uses thereof. 308 U. S. 388. The Court did not discuss or rest its opinion upon the language of the section. It relied instead on the view that a broad meaning should be given the statutory terms in order to effectuate the policy formulated by Congress. 308 U. S. at 340. However, the legislative history fails to reflect any policy which would exclude relevant testimony such as that of Messman and Garrow, who testified only as to facts within their own personal knowledge acquired independently of any wire tapping (*footnote 10, supra*, p. 40). For this reason and in view of the fact that the decision in the second *Nardone* case enunciated a general rule, which went further than analogous common law rules of evidence, and was not a holding on the precise type of situation here involved, we submit that the testimony of Messman and Garrow properly was admitted even assuming that their action in testifying was brought about as a result of their being told that the Government had wire tapping evidence against them.

The adoption of this view would, in effect, limit the scope of Section 605 under the ruling in the second *Nardone* case to instances in which the facts divulged in evidence, as distinct from the witnesses agreeing to testify, were obtained through some use of an intercepted communication, as where, for example, the communication afforded clues used to discover matters later put in evidence. Even so limited, however, the section would be far broader than the rule governing the admissibility of evidence derived from involuntary confessions, although the considerations of policy favoring sanctions in aid of discouraging wire tapping would appear to be no greater than those with respect to discouraging coercion in obtaining confessions. Under the involuntary confession rule, "notwithstanding the inadmissibility of the confession, all facts discovered in consequence of the information given by the accused, and which go to prove the existence of the crime of which he is suspected, are admissible as testimony." 2 Wharton's *Criminal Evidence*, sec. 600, p. 995 (11th ed., 1935).[11]

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[11] See also *United States* v. *Richard*, Fed. Cas. No. 16,154; *United States* v. *Hunter*, Fed. Cas. No. 15,424. See also *Lewis* v. *State*, 220 Ala. 461; *Shufflin* v. *State*, 122 Ark. 606; *Osborn* v. *People*, 83 Colo. 4; *Jones* v. *State*, 75 Ga. 825; *People* v. *Ascey*, 304 Ill. 404; *State* v. *Moran*, 131 Ia. 645; *State* v. *Turner*, 82 Kan. 787; *McQueen* v. *Commonwealth*, 196 Ky. 227; *Belote* v. *State*, 36 Miss. 96; *State* v. *Simpson*, 157 La. 614; *Dupuis* v. *State*, 14 Ohio App. 67; *State* v. *Dixson*, 80 Mont. 181; *Walrath* v. *State*, 8 Neb. 80; *State* v. *Riddle and Huffman*, 205 N. C. 591; *Duffy* v. *People*, 26 N. Y.

IV

SINCE PETITIONERS WERE NOT PARTIES TO THE INTERCEPTED COMMUNICATIONS, THEY HAVE NO STANDING TO OBJECT TO THE INTRODUCTION OF EVIDENCE OBTAINED THEREBY

If the Court rejects our contentions that no part of the proof upon which petitioners were convicted derived from illicit wire tapping, and that even if the contrary were true the connection was so indirect as to be without the scope of Section 605, it should hold that, in any event, petitioners have no standing to invoke the protection of the Act, since they were not parties to any of the intercepted conversations.[12] Such was the first of the grounds upon which the court below sustained the convictions (R. 24–28).

It has long been recognized that the competence of evidence otherwise admissible is not affected by the fact that it was obtained by illegal means. *Bishop Atterbury's Trial*, 16 How. St. Tr. 490, 495, 629 (1723); *Jordan* v. *Lewis*, 2 Stra. 1122, 14 East

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588; *State* v. *Motley*, 7 Rich. Law 327 (S. C.); *Collins* v. *State*, 169 Tenn. 393; *Bryant* v. *State*, 131 Tex. Cr. R. 274; *State* v. *Cocklin*, 109 Vt. 207; *Smith* v. *State*, 166 Miss. 893.

[12] Petitioner Goldstein asserts (Br. 23) that it was discovered subsequent to the decision of the court below that he was a party to eight of the conversations which were intercepted. (See also Schwartz Br. 3.) However, he concedes (Br. 23) that the record does not show this alleged fact, and he does not specify whether the alleged conversations related to the conspiracy or were in any way used by the Government.

306 (1740); *Hester* v. *United States*, 265 U. S. 57; *Olmstead* v. *United States*, 277 U. S. 438, 466–469; *People* v. *Defore*, 242 N. Y. 13, certiorari denied, 270 U. S. 657. Only where some over-riding policy of the Constitution or law of the land requires it will such evidence be excluded. See *Nardone* v. *United States*, 308 U. S. 338, 340. That rule of exclusion is remedial in nature; its purpose is to protect one whose right has been invaded. For this reason it has been uniformly held that only the victim of a search or seizure violative of the Fourth Amendment can object to the admission of evidence so procured; a defendant can object only to the invasion of his own rights.[13] The reasons of policy underlying the rule were stated in *Connally* v. *Medalie*, 58 F. (2d) 629, 630 (C. C. A. 2), per L. Hand, J., as follows:

> We assume for argument that the search and seizure were unlawful; and that any persons aggrieved might suppress the evidence so acquired. None of the petitioners fall within that class. * * * The power to suppress the use of evidence unlawfully

[13] See, e. g., *Whitcombe* v. *United States*, 90 F. (2d) 290 (C. C. A. 3), certiorari denied, 302 U. S. 759; *Belcher* v. *United States*, 50 F. (2d) 573 (C. C. A. 8); *Shore* v. *United States*, 49 F. (2d) 519 (App. D. C.), certiorari denied, 283 U. S. 865; *Ingram* v. *United States*, 113 F. (2d) 966 (C. C. A. 9); *Creech* v. *United States*, 97 F. (2d) 390 (C. C. A. 5); *Remus* v. *United States*, 291 Fed. 501 (C. C. A. 6), certiorari denied, 263 U. S. 717; *MacDaniel* v. *United States*, 294 Fed. 769 (C. C. A. 6), certiorari denied 264 U. S. 593; *Coon* v. *United States*, 36 F. (2d) 164 (C. C. A. 10),

> obtained is a corollary of the power to regain it. The prosecution is forbidden to profit by a wrong whose remedies are inadequate for the injury, unless they include protection against any use of the property seized as a means to conviction. The relief being thus remedial, the evidence has never been thought incompetent against anyone but the victim. Conceivably it might have been; but might have been held that the prosecution, though not disqualified from taking advantage of another's wrong (*Burdeau* v. *McDowell*, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159), should not profit in any wise by its own. But that would obviously introduce other than remedial considerations; the doctrine would then be like that of equity which denies its remedies to one who is not himself scathless.

In cases involving the application of the self-incrimination clause of the Fifth Amendment the courts have been guided by similar considerations. See *Boyd* v. *United States*, 116 U. S. 616, 630; *Gouled* v. *United States*, 255 U. S. 298, 303, 306. It has been consistently held that the right or privi-

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Petitioner Schwartz argues (Br. 11–13) that this rule should be disapproved by this Court because it is inconsistent with the policy of the Fourth Amendment. But the right of the victim to suppress the use of evidence has always been considered a sufficient protection of his right under the Fourth Amendment to be secure against unreasonable searches and seizures. Cf. *Agnello* v. *United States*, 269 U. S. 20, 35.

lege conferred is personal. *Hale* v. *Henkel,* 201 U. S. 43, 69; *Wilson* v. *United States,* 221 U. S. 361; *Grant* v. *United States,* 227 U. S. 74. Thus, if a witness' privilege against self-incrimination is ignored, the party against whom he testified has no standing to claim error. *Morgan* v. *Halberstadt,* 60 Fed. 592, 596 (C. C. A. 2). Similarly, in the case of privileged communications, such as those between attorney and client, husband and wife, and doctor and patient, only the party intended to be protected may object to disclosure; the privilege is not available to third persons or to the state. Wigmore, *Evidence* (3d ed. 1940), Secs. 2196, 2270, 2326.

Section 605 of the Federal Communications Act provides that no person "not being authorized by the sender" shall intercept and divulge any communication, and that no person learning of the contents of "such" communication and knowing that the information was "so obtained" shall use the communication for his own benefit or for the benefit of another not entitled thereto. Except as is indicated in the phrases quoted, the statute does not explicitly reveal whether it was intended to confer a right of objection personal to the sender.[14] By analogy to interpretation of the Fourth and Fifth Amendments and to the usual rules of evidence, however, such a construction

[14] In the case of a telephone conversation there would appear to be two senders. *United States* v. *Polakoff*, 112 F. (2d) 888 (C. C. A. 2), certiorari denied, 311 U. S. 653.

seems proper. Since the section is not violated if the sender authorizes the particular interception, Congress evidently intended to protect him and him only.[15]

If, then, Section 605 creates for the sender alone a privilege similar to that conferred by the Fourth and Fifth Amendments, it does not outlaw the introduction of evidence illegally obtained through wire tapping as against persons, such as the petitioners, not the sender. There are no controlling considerations of policy which should lead to a different rule, and the principle of *Connolly v. Medalie* and the other cases cited at page 46, *supra,* seems as applicable to the statute as to the Fourth Amendment.

Petitioners argue that Section 605 should be interpreted differently because it prohibits not only the acquisition of information by wire tapping, but its divulgence and use as well, whereas it is only by virtue of judicial decisions, not the language of the Fourth Amendment, that evidence obtained by an unlawful search or seizure is excluded (Goldstein Br. 19–25; Schwartz Br. 14–20). The fact is, however, that the Fourth Amendment, as judicially construed, does forbid

[15] Only the sender could maintain a civil action for damages based upon interception, and he, without the concurrence of anyone, could undoubtedly permit disclosure after a communication had been illegally intercepted. The decision in *Weiss* v. *United States*, 308 U. S. 321, in holding that the consent of the sender was not voluntary, seemingly assumed that if it had been, divulgence would have been proper.

the receipt or use of unconstitutionally acquired evidence. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. And in the second *Nardone* case (308 U. S. 338, 340–341) this Court did not rest its decision upon the explicit terms of Section 605 but upon the analogy of the Fourth Amendment as construed in the *Silverthorne* case. Since that Amendment forbids the use of illegally acquired evidence only as against the victim of the search or seizure, we see no reason why a similar rule should not be applied under Section 605.

The contention is untenable that the decision in *Weiss* v. *United States,* 308 U. S. 321, is a holding that the protection of Section 605 extends to persons not parties to the intercepted communications. Although the Court there reversed the conviction of Goldstein, whose conversations had not been intercepted, the point here made was neither argued by the Government nor discussed by the Court. For all that appears, Goldstein's conviction may have been reversed because the error as to the other defendants, whose wires had been tapped, was considered prejudicial to him. Cf. *United States* v. *Thomson,* 113 F. (2d) 643 (C. C. A. 7).

V

THE TRIAL COURT'S CHARGE TO THE JURY WAS NOT UNFAIR OR PREJUDICIAL

Petitioners object to those portions of the trial judge's charge in which he drew the attention of

the jury to possible avenues of inquiry in their consideration of the case. This was done through the method of posing certain questions the answers to which, he suggested, might be helpful in determining the guilt or innocence of the accused (R. 9–19). It is claimed that the questions were "rhetorical" and were so phrased as to express to the jury the court's opinion that petitioners were guilty, and that the court emphasized evidence damaging to petitioners and failed to review petitioners' explanations of the incidents to which the questions were directed. Petitioners say that the charge was therefore "one-sided" and prejudicial.[16] (Goldstein Br. 35–42; Schwartz Br. 22–29). At the time, however, their objections, especially those of petitioner Schwartz, were more limited

[16] Petitioner Rubin asserts (Br. 3–14) that the trial judge erred in denying his request for an instruction that in order for a claimant to recover on a claim for total and permanent disability he need not be absolutely helpless. He then attempts to show, by a review of the evidence, that his claim was not fraudulent. The latter portion of his argument is not covered by the specification of errors (Pet. 20). The denial of the requested instruction was proper for, as the trial judge stated, the test to be applied in a civil action upon the contract of insurance had no bearing upon the issue of Rubin's guilt (Tr. 5164). The question as to Rubin was whether his claim was based upon fraudulent misrepresentations and that was left to the jury under proper instructions (R. 11).

Rubin's further contention (Br. 14–16) that the trial court erred in preventing him from showing what his physical condition was shortly before the trial is outside the specification of errors (Pet. 20) and, in any event, is clearly without merit.

than those now urged (Tr. 5153–5159, 5161). Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239.

It is well settled, of course, that a federal judge may draw attention to and comment on the evidence which he deems important, and even express his opinion on the facts so long as he does not by command or other coercion infringe upon the jury's province to determine them. See *Horning* v. *District of Columbia*, 254 U. S. 135, 138, 139; *Quercia* v. *United States*, 289 U. S. 466, 469; *United States* v. *Murdock*, 290 U. S. 389, 394. Tested by these criteria the charge here when read in its entirety was perfectly proper. The testimony was lengthy. Comment on it, always permissible in the Federal courts, was particularly appropriate. The trial judge was careful to emphasize that he was expressing no opinion as to the guilt or innocence of the defendants (R. 2), and that in commenting upon the evidence and suggesting certain questions for the jury's consideration he did not intend to imply what their conclusions should be (R. 9). The jury, he said, had the right to disregard the questions (*ibid.*). Certainly there is no rule imposing upon the trial judge a duty to refrain from pointing out to the jury the rational implications of the evidence. *United States* v. *Frankel*, 65 F. (2d) 285, 288 (C. C. A. 2), certiorari denied, 290 U. S. 682.

Nor can the charge be condemned because the

trial judge did not emphasize the defendants' explanations of the incidents he recalled. The judge was not required to mention all the items of evidence, especially where as here he disavowed any intention to insinuate that those he cited were "the only important elements in the case" and explicitly told the jury that all the evidence was important (R. 9). *Allis* v. *United States*, 155 U. S. 117, 124.

The judge was equally explicit in his instructions that the determination of questions of fact was for the jury; he specified that the jury was in no way bound by what he said regarding the evidence and that the jury was completely free to approach the facts in its own way and reach its own conclusions. Thus, before making any comment, the judge said:

> * * * Nor in commenting on the testimony do I intend to suggest now what your conclusion should be. I may suggest to you that you may wish to ask yourselves certain questions. In doing that I do not insist, I have no right to insist, that you ask yourselves those questions. You have a right to disregard them (R. 9).

After referring to Messman and Garrow and their associations with petitioners Goldstein and Schwartz, the judge repeated this admonition:

> * * * Again I remind you I am not suggesting the answer to these questions, but I am merely pointing out to you that you may wish to ask these questions of

> yourself in order to reach a conclusion as to what was present in the minds of Goldstein and Schwartz by way of understanding what they were doing in dealing with these various cases that were brought to them by Garrow or Garrow and Messman (R. 14–15).

Later, in speaking of Goldstein, the judge said:

> * * * He was paid by Garrow. What do you say as to his conduct with Garrow over these years? Was it such as was calculated to apprise him of Garrow's activities or not? If it was not, do not hesitate to reach that conclusion and, of course, the same applies to Dr. Schwartz (R. 16–17).

It seems clear, therefore, that the jury understood that it was free to decide all questions of fact and that it was, as the court instructed, the "sole judge of the witnesses" (Tr. 5170). The court below commented that in its decisions it had "repeatedly gone farther than the judge did here" (R. 29).

Neither *Quercia* v. *United States*, 289 U. S. 466, nor *United States* v. *Murdock*, 290 U. S. 389, the principal authorities upon which petitioners rely, support their contention. Both decisions turned on the question whether the jury was left free to exercise its own independent judgment upon the evidence. In the *Quercia* case the judge in his charge told the jury that the defendant's habit of wiping his hands was "almost always an

indication of lying," although there was no such evidence. He also said "I think that every single word that man said, except when he agreed with the Government's testimony, was a lie." It was, therefore, held that the judge had added to the evidence and in effect repudiated as lies all that the defendant said in conflict with the testimony for the prosecution.

In the *Murdock* case, the issue of the defendant's guilt turned upon whether he had wilfully refused to give information as to his income-tax returns. The judge told the jury he believed the defendant had been proved guilty beyond a reasonable doubt, and he refused a request to instruct the jury that if it believed the refusal to answer questions was in good faith, that should be considered in determining whether the defendant had acted wilfully. It was held that in the absence of the requested instruction the effect of the charge was to tell the jury that the refusal to answer was in bad faith and wilful, and thus to fail to submit that issue to the jury. Plainly the charges condemned in these two cases are not comparable with the charge here. Indeed, the opinions permit of no doubt as to the latter's propriety.

CONCLUSION

The trial court found that the Government's proof was derived from sources independent of illegal wire tapping. The court below stated, in

effect, that the evidence was sufficient to support such a finding and no question as to the validity of this conclusion is raised by petitioners' assignments of error or statements of questions presented. Moreover, the evidence was ample. Affirmance of the convictions thus does not depend upon any disputed issue as to the meaning of Section 605 of the Federal Communications Act. Even if the contrary were true, the result would be the same. Petitioners had a fair hearing and the trial court's charge was proper.

It is respectfully submitted that for these reasons petitioners were properly convicted and that the judgment below should be affirmed.

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P. 5.

SUPREME COURT OF THE UNITED STATES.

No. 256.—October Term, 1941.

Dr. Maximilian Goldstein, Dr. Benjamin Schwartz, Herman Rubin, and Irving Eldinoff, Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 27, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

This case involves the alleged violation of § 605 of the Federal Communications Act[1] by the admission of testimony in a federal criminal trial. The importance of the questions presented, and a claimed conflict with our decisions, moved us to grant certiorari.

The petitioners and others were indicted under the mail fraud[2] and conspiracy[3] statutes. The alleged scheme was to defraud insurance companies by presenting false claims for disability benefits.

At the opening of the trial the petitioners moved that the court suppress all records and transcripts of intercepted telephone messages; suppress all evidence the Government obtained by the use of such messages; suppress the testimony of any witness obtained in the first instance by the use of such messages, and that of any witness whose recollection had been refreshed or aided by such messages.

A preliminary hearing was conducted by the trial judge in accordance with the practice established in *Nardone* v. *United States*, 308 U. S. 338. The principal subject of contention was the prospective testimony of Messman and Garrow, alleged co-conspirators who, the petitioners asserted, had confessed and turned state's evidence because they had been confronted with intercepted telephone messages. Messman and Garrow were parties to these mes-

[1] Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103; 47 U. S. C. § 605.
[2] Criminal Code § 215; 18 U. S. C. § 338.
[3] Criminal Code § 37, 18 U. S. C. § 88.

sages, or some of them, but the petitioners were not.[4] The judge ordered all records and transcripts of intercepted messages suppressed as well as all evidence obtained as a result of such messages, but he refused to order suppression of the testimony of witnesses whose memories had been refreshed or aided thereby. He reserved to the trial final decision on so much of the motion as requested the suppression of testimony alleged to be the result of information derived from the messages.

At the trial Government witnesses testified that wire tapping had not furnished clues used in preparing the case. Messman and Garrow were permitted to testify to the facts of which they claimed to have knowledge, over the objection of petitioners. They did not refer to any intercepted messages or to their contents.

The petitioners were convicted and the judgments were affirmed on appeal.[5] The Circuit Court of Appeals held that the convictions ought not to stand if either Messman or Garrow should not have been allowed to testify. It thought that the petitioners having proved divulgence by federal officers of the messages to the witnesses, the burden was upon the Government to prove that their testimony was not induced thereby; that the trial judge failed to find the wire tapping had not been a means of inducing them to testify, but found only that the petitioners had failed to prove it had been the means. In this situation the court was of opinion that if the admission of testimony induced by use of the messages was prohibited by the Communications Act, the judgments should be reversed. The court ruled, however, that, as the petitioners were not parties to any of the intercepted communications, they had no standing to object to their divulgence. In the alternative, it ruled that the testimony was not a divulgence within the meaning of § 605 but, at most, the presentation in court of evidence procured through past divulgences. The court also overruled petitioners' contentions that they had been denied their full right of cross-examination at the preliminary hearing and that the charge to the jury was improper.

We have considered all the assignments of error but find no substance in any of them save those which go to the admission of

[4] It is said that petitioners have now discovered that Goldstein was a participant in twelve of the intercepted telephone conversations, but it is admitted that the record does not disclose this fact and there is no allegation that any of the twelve communications were used in obtaining the confessions.

[5] 120 F. 2d 485.

Messman's and Garrow's testimony. In briefs and oral argument the parties have labored the subject of the burden of proof at the preliminary hearing. The petitioners say it lay with the Government after a showing of wire tapping and divulgence; the respondent says it lay with the petitioners throughout. Each asserts the other failed to carry it. In our view, a decision upon the point is unnecessary.

We come to the capital and pivotal question: Assuming the witnesses' testimony was induced by divulging to them the contents of intercepted telephone messages, was the admission of this testimony erroneous? We hold that it was not.

The petitioners assert that § 605 of the Federal Communications Act forbids the admission of evidence obtained by the use in advance of the trial of unlawfully intercepted telephone conversations, and that one who was not a party to such communications has standing to object to the admission of such evidence. They insist that the decisions of this court in *Weiss* v. *United States*, 308 U. S. 321, and *Nardone* v. *United States*, 308 U. S. 338, require us so to hold and that the court below, in ruling to the contrary, failed to follow those decisions.

It may be helpful in the consideration of these contentions to quote the relevant portions of the statute and to recapitulate this court's decisions in cases involving the admission of evidence in alleged violation of its terms. The relevant provisions of the section declare that " . . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person", and that "no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . ."

In *Nardone* v. *United States*, 302 U. S. 379, we held that the Government's introduction of transcripts and recordings of intercepted interstate messages in the trial of a criminal case constituted a divulgence of such messages contrary to the express terms of the statute.

In *Weiss* v. *United States*, 308 U. S. 321, intrastate telephone communications were intercepted by federal agents, their contents were divulged to certain of the defendants, and, as a result these defendants confessed and agreed to turn state's evidence. They were permitted to testify to the contents of the messages. We held that the interdiction of the statute extended to the interception and divulgence of intrastate as well as interstate messages. In the light of the facts we denied the Government's claim that the witnesses' testifying to the contents of the messages amounted to an authorization by them, as senders, of the divulgence of the communications within the meaning of the statute.

In *Nardone* v. *United States*, 308 U. S. 338, it was claimed that unlawfully intercepted messages had been used to obtain evidence against the senders, and that such use, and the introduction of the evidence so obtained, over the objection of the senders, who were defendants, constituted a violation of the purpose and policy of the statute. We held that if the facts sustained the claim the evidence should have been excluded, and we formulated a procedure for ascertaining the facts.

In none of these cases did this court pass upon the question now presented. In the instant case, the witnesses who confessed and turned state's evidence did not testify either to the existence of the communications or to their contents. The contents of messages to some of which they were parties, but to which the petitioners were not parties, were used by the Government, as we assume, to persuade the witnesses to testify. We further assume that the interception and divulgence of the messages to these witnesses was unlawful because not authorized by the sender.

The petitioners urge that our decision in *Weiss* v. *United States, supra*, necessarily involved the ruling that one who was not a party to the intercepted messages has standing to object to their divulgence at the trial, and, in view of our application of the statute in *Nardone* v. *United States*, 308 U. S. 338, he has standing to object to testimony induced as a result of unlawful interception and use of the messages.

The question now presented was not decided in *Weiss* v. *United States, supra*. The charge was conspiracy. Goldstein, who was not a participant, and other defendants who were participants, in the intercepted conversations, were tried together. All objected to testimony respecting the conversations. We held the

evidence inadmissible. The fact that Goldstein was not a party to the communications, was not overlooked. In the opinion rendered by the Circuit Court of Appeals it was held that the fact could not sustain his conviction if the messages were erroneously introduced.[6] This court assumed, in deciding the case, that the Circuit Court of Appeals was right in holding that, if the admission of the evidence was wrong as to the other defendants, the judgment ought to be reversed as to all. And the Circuit Court of Appeals was of opinion in the present case that, in the circumstances, the messages could not have been used in the *Weiss* case against one of the defendants and excluded as to the others with any reasonable expectation that prejudice would not have resulted to the defendants as to whom the admission of the messages would have been error.[7] In this view we concur.

None of the petitioners was a party to the communications used in obtaining the evidence in this case, No prejudice, therefore, could result by reason of the difficulty of nullifying the effect upon some defendants of evidence incompetent as to them but competent as against other defendants.

It has long been settled that evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used in a prosecution against the victim of the unlawful search and seizure if he makes timely objection.[8] This, for the reason that otherwise the policy and purpose of the amendment might be thwarted. And we have further held that the policy underlying the amendment cannot be circumvented by the indirect use against the victim of evidence so obtained.[9]

Although the unlawful interception of a telephone communication does not amount to a search or seizure prohibited by the Fourth Amendment,[10] we have applied the same policy in re-

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[6] "It may be said with some plausibility that the defendant Goldstein was not prejudiced since he was neither a party to, nor mentioned in, the conversations obtained through wire tapping. These conversations, however, showed that Goldstein's codefendants were engaged in a conspiracy which other proof indicated that he joined. They also gave credence to the testimony of Messman. Such evidence weighed against Goldstein and his conviction ought not to stand if the communications implicating the others were improperly received." 103 F. 2d 352. See also United States *v.* Thomson, 113 F. 2d 643.

[7] 120 F. 2d 489.

[8] Weeks *v.* United States, 232 U. S. 383.

[9] Silverthorne Lumber Co. *v.* United States, 251 U. S. 385.

[10] Olmstead *v.* United States, 277 U. S. 438; Goodman *v.* United States, 962, Oct. Term 1940.

spect of the prohibitions of the Federal Communications Act at the instance of the sender of the message against whom evidence derived from its unlawful interception is sought to be introduced. *Nardone* v. *United States,* 308 U. S. 338.

The question now to be decided is whether we shall extend the sanction for violation of the Communications Act so as to make available to one not a party to the intercepted communication the objection that its use outside the courtroom, and prior to the trial, induced evidence which, except for that use, would be admissible.

No court has ever gone so far in applying the implied sanction for violation of the Fourth Amendment. While this court has never been called upon to decide the point,[11] the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized.[12] *A fortiori* the same rule should apply to the introduction of evidence induced by the use or disclosure thereof to a witness other than the victim of the seizure. We think no broader sanction should be imposed upon the Government in respect of violations of the Communications Act. The court below was of the view that a divulgence of the intercepted messages might lawfully be made with the consent of the sender, and we agree. The court further thought that, as the sender might make such divulgence lawful by his consent, none but he was intended to be protected against divulgence by the statute.[13] Again we agree.

The petitioners, however, point out that the statute also forbids the use of an unlawfully intercepted message, or any information therein contained, by any person for his own benefit or the benefit of another not entitled thereto; and they say that the Government officials violated the Act by using the messages and the information they contained, to induce the senders' confessions

[11] The privilege against self-incrimination afforded by the Fifth Amendment is personal to the witness. Hale v. Henkel, 201 U. S. 43; Wilson v. United States, 221 U. S. 361.

[12] The principle has been applied in at least fifty cases by the Circuit Courts of Appeals in nine circuits and in the Court of Appeals for the District of Columbia, not to mention many decisions by District Courts. Many of the cases are collected in Note 168 to the text of the Fourth Amendment in the United States Code Annotated.

[13] It has been held that both parties to a telephone conversation are senders, as the statute uses the term. United States v. Polakoff, 112 F. 2d 888.

and testimony. They urge that such use is forbidden by the Act and that they have standing to object to the introduction of the evidence thus obtained. The Government answers that this provision of the Act was not intended to reach the use of the contents of the messages by federal officers for obtaining evidence but was meant to prevent use for the personal advantage or benefit of the user. We have no occasion to determine the soundness of the Government's argument.

We are of opinion that even though the use made of the communications by the prosecuting officers to induce the parties to them to testify were held a violation of the statute, this would not render the testimony so procured inadmissible against a person not a party to the message. This is the settled common law rule.[14] There was no use at the trial of the intercepted communications, or of any information they contained as such. If such use as occurred here is a violation of the Act, the statute itself imposes a sanction.[15]

The judgments are

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[14] Olmstead v. United States, 277 U. S. 438, 466, 467.
[15] Section 501, 47 U. S. C. § 501.

SUPREME COURT OF THE UNITED STATES.

No. 256.—October Term, 1941.

Dr. Maximilian Goldstein, Dr. Benjamin Schwartz, Herman Rubin, and Irving Elentuch, Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 27, 1942.]

Mr. Justice Murphy, dissenting.

The Chief Justice, Mr. Justice Frankfurter, and I cannot agree with the opinion of the Court.

Messman and Garrow were the chief witnesses for the Government, and the testimony of each was vital. It is not disputed that Messman turned state's evidence after he was confronted with the contents of telephone messages which implicated him in the offense but which had been obtained by wire-tapping in violation of § 605 of the Federal Communications Act. The extent of the unlawful "tapping" and the keen desire of the Government officials to use the "taps" to secure other testimony are graphically illustrated by the following statement made by an assistant United States attorney to Messman after his arrest:

"I am telling you before we go any further that there is no use of us kidding each other. We have watched your telephone; we have watched all these lawyers' telephones; we have had rooms tapped. We know what is going on. We are not stabbing in the dark. If you want to hear your voice on a record we will be glad to play it. In your instance, Doctor, there is so much to cover. You have been in this for so many years that we feel that in order for you to help yourself, since you are considered one of the principals here, it would be wise for you to indicate to us whether you intend to tell us everything and come clean, or whether you intend to play ball with the Garrows and the rest of the crowd. We feel that you can be of great value and you want to help yourself. That is straight talk."

And Garrow knew of the existence of records of damaging conversations made by illegal "taps" on his lines before his decision to testify for the Government.

Neither the intercepted messages nor their purport were placed in evidence, and, so far as the record shows, petitioners were not parties to them. It is evident, nevertheless, that the evidence adduced by the Government against petitioners through the testimony of Messman and Garrow was obtained by the use of information gathered by wire-tapping in violation of law.[1]

The main question presented for decision is whether evidence so obtained is vitiated and rendered inadmissible by § 605, the relevant part of which reads:

"... and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; ... and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, *or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto* ..."[2]

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[1] Both Messman and Garrow testified at the preliminary hearing that the "taps" did not influence their decisions to testify for the Government, but each was an accomplished perjurer. We do not understand that the trial judge, in ruling that the testimony of Messman and Garrow was admissible, meant to find that the Government proved that the "taps" did not contribute to their breakdown. On the contrary, it is clear that he meant to find only that petitioners failed to carry the burden of proving that the Government secured the testimony of Messman and Garrow by use of the "taps", a burden which he erroneously put upon petitioners. For after an accused sustains the initial burden, imposed by Nardone v. United States, 308 U. S. 338, of proving to the satisfaction of the trial judge in the preliminary hearing that wire-tapping was unlawfully employed, as petitioners did here, it is only fair that the burden should then shift to the Government to convince the trial judge that its proof had an independent origin. As the court below said:

"... this should be the rule in analogy to the well settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so; that is, that it is unfair to throw upon the innocent party the duty of unravelling the skein which the guilty party has snarled. To impose the duty upon the prosecution is particularly appropriate here, for it necessarily has full knowledge of just how its case has been prepared; given a prima facie case against it, i. e., 'taps' and some use of them, it should do the rest." 120 F. 2d 485, 488.

Since the trial judge did not shift the burden to the Government after petitioners' initial showing as he should have done, there can be no contention on this record that the testimony of Messman and Garrow was untainted by "taps".

[2] Emphasis added.

The statute expresses a rule of public policy. In enacting § 605 Congress sought to protect society at large against the evils of wire-tapping and kindred unauthorized intrusions into private intercourse conducted by means of the modern media of communication, telephone, telegraph, and radio. To that end the statute prohibits not only the interception and the divulgence of private messages without the consent of the sender, but also the use of information so acquired by any person not entitled to it. The protection of the statute would have been illusory indeed if, while interception and divulgence were penalized, one was free, nevertheless, to use information so obtained. Unless the language of the "'use for benefit" prohibition does not mean what it says, the actions of the Government agents in securing the benefit of the crucial testimony of Messman and Garrow by the use of illegal "taps" were clear violations of that prohibition. There is no merit in the Government's contention that the unequivocal language of the "use for benefit" clause should be construed as condemning only such uses as are designed to result in some monetary or other similar benefit of a private nature, for the prohibitions of § 605 are applicable to the Government and its officers, as well as to private persons. *Nardone* v. *United States,* 302 U. S. 379. The prohibition in this last clause of § 605 by Congress of the "use" of outlawed evidence is so unequivocal and controlling that the failure of the court below even to refer to this clause can only be explained on the assumption that it was overlooked.

On the issue of admissibility the second *Nardone* case, 308 U. S. 338, the logical extension of the principles of *Nardone* v. *United States,* 302 U. S. 379, and *Weiss* v. *United States,* 308 U. S. 321, should control our decision. In that case, as in this, the evidence in dispute was not the messages themselves or their purport, but the claim was made that other evidence against the defendants was obtained by the use of information gained by unlawful wire-tapping. We held that the policy of § 605 required the exclusion not merely of the intercepted messages but also of the other evidence acquired through their unlawful use. Otherwise the broad purpose of the statute to outlaw practices "inconsistent with ethical standards and destructive of personal liberty"[3] would have been largely defeated. We also suggested the preliminary hearing as a procedure for determining what evidence was the

[3] Nardone v. United States, 302 U. S. 379, 383.

"fruit of the poisonous tree" and hence inadmissible. Since the preliminary hearing in this case leaves no doubt that the testimony of Messman and Garrow was the forbidden fruit, it should not have been admitted.

The only possible differentiation between this case and the second *Nardone* case is that here petitioners were not parties to the illegally intercepted messages, but that calls for no difference in legal result. While the sender can render interception, divulgence, or use lawful by his consent, it is a complete non-sequitur to conclude that he alone has standing to object to the admission of evidence obtained in violation of § 605. To say that petitioners have no standing to object to the testimony of Messman and Garrow because they were not parties to the intercepted messages used to secure that testimony, is to ignore the governing factor that controlled our decision in the second *Nardone* case, namely, that to permit the use of evidence so obtained would defeat or substantially impair the underlying policy and purpose of § 605. It is immaterial, for the object to be served by that section, whether objection is made by the one sending the communication or by another who is prejudiced by its use. The rule that evidence obtained by a violation of § 605 is inadmissible is not a remedy for the sender; it is the obedient answer to the Congressional command that society shall not be plagued with such practices as wire-tapping.

Lower federal court cases to the effect that only the victim of a search and seizure contravening the Fourth Amendment can object to the evidence thereby obtained do not offer a proper analogy. Not only are those decisions hard to square with statements by Mr. Justice Holmes in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392,[4] but, even assuming their soundness, sufficient difference in scope exists between § 605 and the Fourth Amendment to render analogy unsafe. Thus § 605 for-

[4] "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. . . . the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

The guaranties of the Fourth Amendment "are to be liberally construed to prevent impairment of the protection extended". Grau v. United States, 287 U. S. 124, 128, and cases cited.

It is evident that to allow the Government to use evidence obtained in violation of the Fourth Amendment against parties not victims of the unconstitutional search and seizure is to allow the Government to profit by its wrong and to reduce in large measure the protection of the Amendment.

bids all interception, divulgence, or use by any person without the consent of the sender, while the Fourth Amendment bans only unreasonable searches and seizures.

The holding in the opinion of the Court that evidence obtained in violation of § 605 is not rendered inadmissible because § 501 of the Act provides specific sanctions for violations of § 605, is a direct repudiation of both *Nardone* cases and the *Weiss* case. In each of those cases evidence secured by violation of § 605 was declared to be inadmissible, despite the existence of § 501. This is so because, as we held in the first *Nardone* case, "the act forbids such testimony." 302 U. S. 379, 382. That evidence procured in violation of federal law by agents of the Government is inadmissible in federal prosecutions has been established and enforced by an unbroken series of decisions in this Court beginning with *Weeks* v. *United States*, 232 U. S. 383. By these decisions this Court has refused to make itself a participant in lawless conduct by sanctioning the use in open court of evidence illegally secured. That principle was forcibly put in a separate opinion in *Sorrells* v. *United States*, 287 U. S. 435, 453. After referring to "the inherent right of the court not to be made the instrument of wrong", the opinion continues: "The doctrine [the defense of entrapment] rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and the court alone to protect itself and the government from such prostitution of the criminal law." 287 U. S. 435, 456, 457. When Congress condemned the "use" of lawlessly intercepted communications, the last thing it intended to sanction was the use of such interceptions in a court of justice. There can be no reason to ignore or silently overrule our considered decisions in both *Nardone* cases and the *Weiss* case, especially in view of the fact that Congress has had several opportunities since the first *Nardone* case to amend § 605 to obviate the result of that case if it were not a true interpretation of Congressional policy and intent.[5]

[5] Several attempts to amend § 605 since the first Nardone case have failed of enactment. See S. 3756, 75th Cong., 3d Sess. (1938) and S. Rep. No. 1790, 75th Cong., 3d Sess. (1938) p. 3. See also H. J. Res. 571, 76th Cong., 3d Sess. (1940); H. R. 2266, 77th Cong., 1st Sess. (1941); H. R. 3099, 77th Cong., 1st Sess. (1941); H. R. 4228, 77th Cong., 1st Sess. (1941).